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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-116

RALPH D. ROCKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

Petitioner, Ralph D. Rocks, respectfully moves the Court for an order vacating its denial of the petition for a writ of certiorari, entered on November 19, 1973, and granting the petition. As grounds for this motion, petitioner states the following:

1. *The recent argument in the United States v. Maze, No. 72-1168.*

On November 14, 1973, while certiorari in this case was pending, this Court heard argument in *United States v. Maze*, No. 72-1168. The account of the proceedings in

Maze, in the November 28th issue of the Criminal Law Reporter, indicates that the two cases closely parallel each other and that the decision in *Maze* may be determinative of the present controversy. (14 Cr. L. 4099-4101). Although *Maze* involves the reach of the mail fraud statute, 18 U.S.C. §1341, it appears from the argument that the Court has been asked there to redefine the principles articulated in *Rewis v. United States*, 401 U.S. 808, a Travel Act case, and, under facts similar to those here, to enunciate a rule delimiting cases involving a substantial federal interest from those involving only a technical justification for federal criminal intervention. (14 Cr. L. 4099, 4100).

The defendant in *Maze* had employed a stolen credit card to obtain merchandise and the defrauded merchant had thereafter mailed the credit voucher to the credit card company. The issue in that case, most narrowly expressed, is whether the incidental use of the mails, after the merchandise had been obtained fraudulently, resulted in a prosecutable mail fraud. The present case, brought under the Travel Act, involves a check which was allegedly given by the defendant as a bribe, and which, presumably after its delivery to the alleged bribee, thereafter crossed the Maryland-D.C. line (Tr. 65, 113, 169-72, 265, 367, 1801).[1] If the Court should rule in *Maze* that the use of the mails was too insubstantial to bring the case within the reach of the federal act, it should follow that the interstate use in the present case was similarly deficient.

2. *The second opinion in United States v. Archer, ... F.2d. ..... (2d Cir. 1973).*

On September 26, 1973, while the Petition for Certiorari was pending in this case, the Court of Appeals for the Second Circuit, on petition for rehearing, issued a second

[1] See also, Gov't. Brief in Court of Appeals, pp. 6 and 7.

opinion in *United States v. Archer*, ... F.2d ..... (Sept. Term, 1972, Nos. 1039-41). This second *Archer* opinion, not yet reported, appears as the Appendix hereto.

As the second opinion clearly states, only interstate uses in furtherance of the alleged criminal object may be considered in determining whether there is sufficient basis for prosecution under the Travel Act (App. 5a-7a). Innocent interstate activity must be disregarded (App. 5a-7a). The present case involves an indictment for a single alleged use of interstate facilities. The Government's argument here, that innocent interstate transactions between the participants might bolster an otherwise flimsy basis for federal criminal intervention, is in conflict with the express holding of *Archer*.

The second *Archer* opinion takes note of the fact that the Government "professes alarm" at the "precedential effect" of the holding that the casual and incidental use of interstate facilities there did not suffice "to extend federal power" to deal with local corruption (App. 7a). The second Circuit went on to invite further guidance, however, stating, in its concluding sentence, that "the task of further line-drawing" was for "the future". It would appear that the issue is of such significance to the Government and to the courts that this Court should take the opportunity to resolve the problem in the present case.

3. *The pendency of the petition in Baggett v. United States, No. 73-348.*

The petition for certiorari in *Baggett v. United States*, No. 73-348, a companion to this one, arising from the same indictment, is presently pending. The *Baggett* case, involving the alleged bribee, also raises questions as to the scope of the Travel Act. If the Court should grant certiorari in

Baggett, it should also, for the sake of completeness, do the same here.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

ARNOLD M. WEINER,
A. KENNETH PYE,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

As counsel for the petitioner, we hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

ARNOLD M. WEINER,
A. KENNETH PYE,
Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1039—September Term, 1972.
1040
1041

Decided September 26, 1973.

Docket Nos. 73-1527
73-1528
73-1711

UNITED STATES OF AMERICA,
Appellee,

v.

NORMAN ARCHER, FRANK R. KLEIN and LEON WASSERBERGER,
Defendants-Appellants.

Before:

Friendly, Feinberg and Mansfield,
Circuit Judges.

ON PETITION FOR REHEARING

PAUL J. CURRAN, United States Attorney for the Southern District of New York (Rudolph W. Giuliani, John W. Nields, Jr., and John D. Gordon III, Assistant United States Attorneys), *for Appellee.*

MAURICE H. NADJARI, Deputy Attorney General (Peter J. O'Connor, Special Assistant At-

torney General), *for the Office of Special Prosecutor, State of New York, amicus curiae.*

FRANK S. HOGAN, District Attorney, New York County (Alfred J. Scotti, Chief Assistant District Attorney, and Michael R. Juviler, Assistant District Attorney), *amicus curiae.*

MICHAEL ARMSTRONG, District Attorney, Queens County, *amicus curiae.*

PER CURIAM:

Beginning with a nine-page description of the background alleged to have justified its setting up the crime with which defendants were charged, the Government attacks both what it characterizes as dicta in our opinion and the precise holding that the use of interstate and foreign telephone facilities in this case did not suffice to bring the defendants within the Travel Act.

Although the record does not contain proof of many of the facts now called to our attention by the Government for the first time as evidence of the background of its investigation, we do not question that the federal prosecutors had been given abundant information about the widespread fixing of cases in the Queens County District Attorney's office,[1] some of which, we are now told, may have involved conduct violating the Travel Act, 18 U.S.C. §1952.

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[1] This came in principal part from a commission established in 1970 by Mayor Lindsay of New York City and chaired by Whitman Knapp, Esq., a distinguished lawyer who has since become a judge of the District Court for the Southern District of New York. According to the Government's petition, the Knapp Commission sought the assistance of the Department of Justice; the New York City Police Commissioner "thoroughly endorsed" a federal investigation of the Queens County prosecutor's office; and "the United States Attorney disclosed the plan to a member of the state judiciary with administrative responsibility over the state court system in Queens." While this lessens the offensiveness to the State of the conduct here at issue, local invitations cannot expand the constitutional and legislative limitations on federal criminal jurisdiction.

We readily appreciate the justified indignation this aroused and can understand the consequent desire of federal law enforcement officials to clean these Augean stables of the State. That Archer has been dismissed from his post as a result of the Government's effort is indeed a "good" result, as the petition repeatedly emphasizes. None of this, however, is relevant to the sole issue decided, namely, that the evidence here did not show a federal crime under a fair reading of the Travel Act.

The Government devotes much of its petition to issues which we felt desirable to ventilate in view of the appellants' arguments but were at pains neither to decide nor to pronounce dicta. Nine pages of the petition are devoted to an attempt to show that the Government agents committed no crimes and that what it chooses to call the "investigating technique" here employed "was entirely proper," although we expressely left "resolution of this difficult question for another day," ..... F.2d at ....., slip opinion at 4821. The final pages of the petition stoutly maintain that "The Government's investigation of local corruption in this case was a proper and necessary use of federal power." The case for this assertion would certainly be stronger if, as the Government advises us now, as it did not in its brief or argument, there was reason to believe that the local corruption in Queens had involved some violations of the Travel Act. But we specifically declined to decide whether we could or should dismiss the prosecution as an abuse of federal power, ... F.2d at ....., slip opinion at 4823. We thus need only consider Point I of the petition, in which the Government urges that we gave too narrow a reading to the Travel Act.

Despite the copious citation of cases, including many not included in its original brief, not one of the Government's citations supports application of the Travel Act where the sole "federal" elements were telephone calls from or to an undercover agent. Despite grave reservations whether interstate or foreign travel or transportation or use of interstate or foreign telephone facilities by an undercover agent, as distinguished from actual participants in the crime, can

ever supply the federal jurisdictional basis required by the Travel Act, we left open the possibility that this might suffice when sufficiently pervasive or functional. Our holding was on the narrow basis that these conditions were not here fulfilled. In its petition for rehearing, the Government argues that there was at least evidence of an agreement to make interstate or foreign calls, thus justifying the conviction on the conspiracy count, and that legislative history and prior decisions require us to hold that the Las Vegas and Paris calls were sufficient to invoke the Travel Act. We disagree.

On the first point, the Government asserts that "Klein and Wasserberger had, before any actual travel or use of an interstate facility, agreed to use such facilities to promote the bribe." However, the Government greatly overstates the evidence as to the alleged agreement. The transcript of the tape recording of the critical conversation between Bario, Wasserberger and Klein reveals the following: Klein said he must have the bribe money in advance. For that purpose he needed a way to get in touch with Bario. Bario responded that he had no phone in Las Vegas and that he would be out of the country a great deal in the near future. He added that Wasserberger knew whom to call to ensure that the money would be there on time. "There are some people who know exactly where I am at all times," Bario assured Klein. That answer seemed to satisfy Klein, for he made no further inquiries concerning Bario's whereabouts.

Bario and Wasserberger then left Klein's office. The Government states that "Wasserberger and Bario agreed that Bario should call Klein directly to find out if Klein could guarantee that the case would be fixed." That characterization, however, is misleading. Actually, Bario independently proposed that he should call Klein, and he made no mention of where he would be at the time he intended to call. Contrary to the Government's assertion, Bario was given no instructions to call Klein's office on April 25 or any other date; in fact, when Bario called, Klein could only say that he would have some news for him the next day.

The Government insists that it was only after Klein and Wasserberger had exerted great pressure on Bario that he was forced to contrive a Las Vegas "cover." Yet the pretended Nevada connection had been part of the Government's plan from the first. Bario testified at trial that when Klein asked where he lived, he gave the Las Vegas address that the Government had originally supplied for him on his identification papers. Later, while Bario and Wasserberger were driving back to Manhattan, Wasserberger mentioned that he might someday want to visit Las Vegas. It was in response to Wasserberger's expression of interest in visiting him there that Bario volunteered he could be reached at the Sahara Hotel.

In light of this evidence, there is no indication that the defendants agreed either to make or to cause to be made any interstate or foreign telephone calls. At the conclusion of the meeting, Klein expected that he could reach Bario by calling Wasserberger; through Bario's subsequent fabrication, Wasserberger learned — or thought he learned — that Bario could be reached at the Sahara Hotel, but no plans were made for Wasserberger to call him there. The Government points to no further evidence of any agreement.

Besides insisting that the defendants agreed to make interstate or foreign calls, the Government disputes our conclusion that the calls themselves were insufficient to invoke the Travel Act. While it has wisely abandoned its reliance on the Newark calls, it contends that Bario's call from Paris and Wasserberger's unsuccessful attempts to reach Bario in Las Vegas sufficed to meet the jurisdictional requirements of § 1952. We disagree. The Nevada calls are of no jurisdictional significance. Although the Government insists that those calls were not "planted," but were "suggested, pressed for and accomplished solely by the defendants without any encouragement by Bario and despite Bario's actively discouraging such calls," the evidence summarized above shows that Bario volunteered the story about reaching him at the Sahara Hotel, consistent with the Government's design to present him as a

Las Vegas underworld figure. Moreover, while Wasserberger made the calls in an effort to convey information to Bario about the proposed bribe attempt, there was no possibility at any time that the calls could further the enterprise or even go through to the intended recipient.[2]

The Government insists that the Paris call was one that the defendants "caused" Bario to make, but it is clear from the evidence outlined above that Bario made the call on his own initiative. The Government places great weight on the fact that Bario was in Paris on legitimate business and was not sent there solely to manufacture jurisdiction in this case. But that fact alone is not sufficient to qualify the Paris call. Any such holding would permit the Government to convert any local bribery it had provoked into a federal offense by furnishing an out-of-state address for an undercover agent or sending him outside the state on a legitimate errand and having a call made before the offense was consummated. The Travel Act confers ample power on federal law enforcement officers to assist local officials without going so far. Both the legislative history summarized in our opinion and the additional extracts relied on in the Government's petition show that the overriding Congressional purpose was to permit the federal government to act against members of organized crime whose activity crossed state lines when local law enforcement officers were unable or unwilling to do so — not to extend federal power to deal with corruption in local prosecutors' offices by affording the corrupters an opportunity to use interstate or foreign telephone facilities in dealing with an undercover agent on any such "casual and incidental" basis

[2] The Government cites *United States v. Hedge*, 462 F.2d 220 (5 Cir. 1972), as contrary to the result reached here. In that case the Mississippi-based defendants ordered numerous sets of dice from a Las Vegas manufacturing company for which one of them worked as a salesman. The dice arrived in the mail, but the defendants refused to pay for them and they were returned unclaimed. The court upheld their Travel Act convictions even though there was no direct relationship between the use of the mails and the subsequent unlawful gambling. Unlike the Las Vegas calls here, the dice shipment was a bona fide operation which, until the defendants refused delivery, had every prospect of promoting the gambling enterprise.

as here. See *United States v. Corallo*, 413 F.2d 1306, 1325 (2 Cir.), *cert. denied*, 396 U.S. 958 (1969).

While the Government professes alarm at the precedential effect of our decision, we in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves and that this was not met here. We adhere to that holding and leave the task of further line-drawing to the future.

The petition for rehearing is denied.